Supreme Court, U.S.
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No. 95-1111

In The

Supreme Court of the United States

October Term, 1995

THE ESTATE OF BERNICE MENNA; DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA,

Petitioners,

vs.

ST. AGNES MEDICAL CENTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether state courts have concurrent jurisdiction over a civil action brought under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, and under the False Claims Act, 31 U.S.C. § 3729, *et seq.*?

2. Whether the Court of Appeals abused its discretion when it penalized Petitioners and their counsel under Federal Rule of Appellate Procedure 38 for a frivolous appeal?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

St. Agnes Medical Center is a corporation owned by the Franciscan Health System. The Franciscan Health System is operated by the Sisters of St. Francis, a religious order. St. Agnes Medical Center has no nonwholly owned subsidiaries.

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COUNTERSTATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

On April 19, 1994, Petitioners, The Estate of Bernice Menna and Daniel Menna, Individually and as Administrator of the Estate of Bernice Menna ("Petitioners"), commenced an action in the United States District Court for the Eastern District of Pennsylvania against Respondent, St. Agnes Medical Center ("Respondent," "St. Agnes," or "the hospital"), for damages related to Bernice Menna's February 1984 hospitalization at St. Agnes. On September 2, 1994, Respondent filed a Motion to Dismiss the Complaint due to the *res judicata* and collateral estoppel effect of parallel and concurrent proceedings pending in Pennsylvania state courts. On September 23, 1994, the District Court, VanArtsdalen, J., denied the Motion. Instead, the Court applied the exceptional circumstances doctrine enunciated by this Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and stayed the federal court proceedings pending disposition of the state court proceedings. On September 5, 1995, the United States Court of Appeals for the Third Circuit, Greenberg, Cowen, and Sarokin, JJ., affirmed. Petitioners moved for Rehearing En Banc, which was denied by the Third Circuit on October 12, 1995.

In a confusing presentation laced with baseless accusations of fraud and other nefarious conduct, Petitioners appear to present two questions for review by this Court. However, the first question has been settled by a long line of decisions of this Court. The second question merely quarrels with the Third Circuit's discretionary decision to penalize the Petitioners and their counsel under Federal Rule of Appellate Procedure 38 for a frivolous appeal. For these reasons, the Petition for Writ of Certiorari presents no compelling reasons that justify devoting this Court's precious judicial resources and energy to the questions presented.

B. Factual History

The factual history material to the questions presented here can be gleaned from the comprehensive Memorandum Opinions of the Third Circuit and of the District Court entered in this case. Although this factual history addresses for the most part the correctness of the District Court's stay Order, a question which does not appear to be presented for review, Respondent is obligated by Supreme Court Rule 15(2) to address the many misstatements of fact contained in Petitioners' Statement of the Case. *(See* Pet. at 1-4).

Litigation in this matter began over ten years ago. On April 22, 1985, Bernice Menna initiated a medical malpractice action in the Pennsylvania Court of Common Pleas of Philadelphia County against St. Agnes and against her attending physicians at St. Agnes, Bernard Segal, M.D., and Likoff-Segal Associates ("*Menna I*"). (Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") at 2, 11-12). After Mrs. Menna passed away, Daniel Menna, the administrator of his mother's estate, was substituted as plaintiff. (Pet. App. 12). Two years of discovery failed to produce an expert critical of St. Agnes or its personnel. Therefore, in 1987, St. Agnes was dismissed from *Menna I* with prejudice after all parties to *Menna I* signed an Order and Stipulation of Dismissal as to St. Agnes, which was approved and entered by the Court of Common Pleas. The lawsuit continued against the two remaining defendants. (Pet. App. 2, 12).

In 1990, Mr. Menna terminated his attorney-client relationship with his original counsel, Gustine Pelagatti, and retained new counsel, John J. O'Brien, III. (Pet. App. 2, 12). Mr. O'Brien is married to Mr. Menna's sister, Josephine Menna O'Brien. (Pet. App. 13). Soon afterwards, the Menna family embarked on its still-ongoing mission to reinstate their claims against St. Agnes.

They immediately took three steps in the Court of Common Pleas. First, Mr. Menna petitioned the Court of Common Pleas to strike the discontinuance as to St. Agnes because he claimed that he did not know about or consent to it. He also moved to amend *Menna I* to allow him to assert causes of action for punitive damages; for violation of the Pennsylvania Consumer Protection Law, 73 Pa. C.S.A. § 201, *et seq.*; and for emotional and financial loss. Lastly, Daniel and Josephine Menna filed a second complaint against St. Agnes in the Court of Common Pleas, asserting causes of action for medical malpractice and unknown statutory violations (*"Menna II"*). (Pet. App. 2-3, 13). On June 11, 1990, after oral argument, the Court of Common Pleas granted the Motion to Amend the Complaint limited only to a claim for medical expenses incurred by or on behalf of Mrs. Menna during her hospitalization. The Motion to Amend was otherwise denied, as was the Motion to Strike the Discontinuance. *Menna II* was also dismissed based on the doctrine of *lis pendens*. (Pet. App. 3, 14). The Mennas appealed the denial Orders to the Superior Court of Pennsylvania. They argued on appeal, as they still do some six years later, that Bernice Menna was discharged from St. Agnes because the hospital's Utilization Review Committee wanted her out of the hospital. A three-judge panel of the Superior Court affirmed the Orders of the Court of Common Pleas in 1991. (Pet. App. 3, 14). The Supreme Court of Pennsylvania denied the Mennas' Petition for Allowance of Appeal in 1992. (Pet. App. 3, 14).

In 1993, the Mennas settled *Menna I* with Dr. Segal and Likoff-Segal Associates. (Pet. App. 14). Although this settlement should have ended this litigation, the Mennas tenaciously persevered in their efforts to reinstate their claims against St. Agnes.

In September 1993, the Mennas filed a Motion for Reconsideration of Plaintiff's Motion to Strike the

Discontinuance of St. Agnes Based on After Discovered Evidence ("Motion for Reconsideration"). (Pet. App. 3, 14-15). In this Motion, the Mennas rehashed their lack of knowledge argument that had been fully considered and rejected years ago by the trial and appellate courts. However, they also claimed that they recently discovered additional medical records of Bernice Menna's 1984 hospitalization, which they attached to the Motion for Reconsideration, and that these records indicate that St. Agnes had prepared false records regarding Mrs. Menna's hospitalization in order to circumvent the medicare laws. Interestingly, most of the exhibits attached to the Motion for Reconsideration still bore the page numbers the documents were assigned in the Reproduced Record that was filed with the Superior Court in 1991 in connection with the appeal of the Orders entered in *Menna I* and *Menna II*, thus disposing of the Menna's "after acquired evidence" contentions. The Mennas also alleged that St. Agnes had destroyed records, including CT films, necessary to prosecute the Mennas' civil action. (Pet. App. 3, 15). St. Agnes responded that it had produced all non-privileged medical records to Mr. Pelagatti during discovery prior to 1987 and that Mr. Pelagatti had apparently failed to send complete records to Mr. O'Brien. St. Agnes also responded that there is no evidence that it had destroyed the CT films during the pendency of the medical malpractice action. Rather, it appears that the films were never requested until 1991, four years after St. Agnes had been consensually dismissed from the civil action and seven years after the treatment had been rendered to Bernice Menna.

In 1993, the Mennas also filed a professional malpractice action against Mr. Pelagatti and his law firm (*Menna III*) and conducted a discovery deposition of Dr. Segal in connection with this civil action. (Pet. App. 15). Neither a corporate representative of St. Agnes nor its counsel was present at that deposition. Mr. O'Brien claims that nineteen pages of Bernice

Menna's 1984 medical records were produced at that deposition that had not been produced previously. (Pet. App. 15). Therefore, the Mennas filed yet another pleading in support of their Motion for Reconsideration, entitled "Supplemental to the Motion for Reconsideration Due to the Disclosure on January 5, 1994, of the Concealment of Evidence." (Pet. App. 15). In this pleading, the Mennas claimed that medical records had been concealed for eight years by St. Agnes, its counsel, and/or Mr. Pelagatti. By February 8, 1994, the Mennas claimed that they had in their possession eighty pages of Bernice Menna's 1984 medical records that had not been produced to them previously, a fact that they brought to the Court's attention in yet another "supplemental." They claimed that these records show that Mrs. Menna was discharged from St. Agnes at the behest of the Utilization Review Division even though she required medical treatment.

While the Mennas' Motion for Reconsideration was pending in the Pennsylvania state court, the Mennas shifted their attack against St. Agnes to a federal forum by filing on April 19, 1994, the Complaint which lies at the heart of the Petition for Writ of Certiorari in this case (*"Menna IV"*). (Pet. App. 3, 16). *Menna IV* asserts essentially the same cause of action as *Menna I* and *Menna II* — that St. Agnes failed and neglected to properly treat and care for Bernice Menna, that Utilization Review required Bernice Menna be discharged from St. Agnes Hospital even though she suffered a stroke, and that St. Agnes and its counsel fraudulently concealed records of the discharge in order to frustrate the Mennas' civil action. In addition, however, the complaint alleges causes of action for breach of expressed and implied warranties, breach of a written agreement, intentional and negligent misrepresentation of services, fraud in the concealment of records, violation of the Pennsylvania Unfair Trade Practice and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*, violation of the Medicare Health Act, 42 U.S.C. § 1395, *et*

seq., breach of doctor-patient relationship, and violation of the False Claims Act, 31 U.S.C. § 3729, *et seq.* By this time, the number of pages of Bernice Menna's 1984 medical records that had allegedly originally been concealed and/or missing but later produced at Dr. Segal's 1994 deposition had swelled to 100 pages. Again, however, many of these pages were previously marked as part of the Superior Court Reproduced Record filed in 1991.

Before St. Agnes had even been served with the Complaint in *Menna IV* or had time to respond to it, the Mennas attempted to depose Donald Ladd, Esquire, who represented St. Agnes in the Pennsylvania state court action and secured the stipulated discontinuance as to St. Agnes. The Mennas even filed a Motion to Compel Mr. Ladd's deposition, but the Motion was denied by the District Court because it was filed in violation of Sections 4.01(a) and (b) of the Civil Justice Expense and Delay Reduction Plan of the United States District Court for the Eastern District of Pennsylvania before the Mennas had provided certain mandatory disclosures to St. Agnes. (Appendix to Brief in Opposition to Petition for Writ of Certiorari (hereafter "Resp. App.") at 1). The Mennas did not appeal this Order to the Third Circuit.

In response to the Complaint, St. Agnes filed a Motion to Dismiss, premised on Federal Rule of Civil Procedure 12(b)(6). Because *Menna IV* raised claims essentially identical to those raised in the state court proceedings, St. Agnes moved for dismissal based on, *inter alia*, the *res judicata* and collateral estoppel effect of the 1987 stipulated discontinuance as to St. Agnes in *Menna I*. (Pet. App. 16).

On September 22, 1994, Judge VanArtsdalen issued a Memorandum Opinion denying St. Agnes' Motion to Dismiss and, instead, staying *Menna IV* pending the disposition of the

ongoing parallel and concurrent proceedings in the Pennsylvania state courts. (Pet. App. 3-4, 17-26). On September 23, 1994, the District Court entered an Order staying *Menna IV* and transferring the case to the Court's Suspense Docket. (Pet. App. 26-27). The Third Circuit affirmed on September 5, 1995. (Pet. App. 1-10). Petitioners' Petition for Rehearing En Banc was denied by Order dated October 12, 1995. (Pet. App. 28-29).

Meanwhile, the state court proceedings advanced. On September 27, 1994, the Mennas filed yet another "supplemental" in support of their Motion for Reconsideration. This pleading, however, was nothing more than the same brief they had filed in the District Court in *Menna IV* just two weeks earlier in response to St. Agnes' Motion to Dismiss. This "supplemental" contained a copy of a May 16, 1994, letter to Mr. O'Brien written by Mark F. Victor, M.D., one of Bernice Menna's attending physicians at St. Agnes in 1984. The purpose of the letter was to interpret a handwritten note written by Dr. Malamut that was contained in Bernice Menna's 1984 medical records. However, Dr. Victor never indicated in the letter that the information contained in the 1984 medical record was erroneous or fabricated. This same letter was attached to Petitioner's response to St. Agnes' Motion to Dismiss *Menna IV*.

The Mennas' Motion for Reconsideration was denied by the Court of Common Pleas in a Memorandum and Order dated October 13, 1994. The Court ruled that the evidence of record confirms that St. Agnes provided Bernice Menna's 1984 medical records to Mr. Pelagatti even though the records may not have been provided to Mr. O'Brien. The Court further ruled that there is no evidence that St. Agnes ever concealed or destroyed CT films or medical records. This Order prompted a second appeal by the Mennas to the Superior Court of Pennsylvania, which affirmed in a Memorandum Opinion and Judgment entered July 26, 1995. The Mennas then petitioned the Superior Court for

rehearing en banc and petitioned the Supreme Court of Pennsylvania for allocatur. The Superior Court denied the Petition for Rehearing on October 6, 1995. St. Agnes fully expects the Supreme Court of Pennsylvania to deny the Mennas' Petition for Allowance of Appeal because it was filed while the Superior Court petition for rehearing was still pending, in violation of the Pennsylvania Rules of Appellate Procedure.

At this point, the activity returned to federal court. On October 20, 1995, the Third Circuit issued a certified copy of the Judgment in lieu of a formal mandate and taxed costs in favor of St. Agnes in the amount of $334.80. On October 23, 1995, Petitioners moved the Third Circuit to stay the mandate pending application to this Court for a Writ of Certiorari. On October 26, 1995, St. Agnes filed a Motion for Attorneys' Fees and Double Costs under Federal Rule of Appellate Procedure 38 and Third Circuit L.A.R. 108.1, seeking an award of $8,055 in attorney's fees and $334.80 in additional (double) costs against Petitioners and their counsel. (Resp. App. 3a-21a). The Third Circuit granted St. Agnes' application and sanctioned Petitioners and their counsel by Order entered November 21, 1995, awarding St. Agnes the full amount of attorneys' fees and costs sought in its Application. (Pet. App. 30-31). That same day, the Third Circuit entered an Order denying Petitioners' Motion to Stay the Mandate. (Pet. App. 32). On November 28, 1995, Petitioners filed a Petition for Rehearing En Banc of the attorney fee award. On December 1, 1995, Petitioner once again moved the Third Circuit to stay the mandate. However, because Petitioners had already filed one such motion, the second Motion to Stay was returned to the Petitioners by the Third Circuit because it was filed in violation of the Federal Rules of Appellate Procedure and the Third Circuit's local rules. On December 21, 1995, the Third Circuit denied Petitioner's Motion for Rehearing En Banc of the attorney fee award. (Pet. App. 33-34). Finally, on December 22, 1995, Petitioners filed a Motion to Recall the Third Circuit

Mandate, which is still pending. On January 8, 1995, Petitioners filed the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

In a rambling and disjointed presentation, Petitioners appear to be offering two reasons in support of their demand that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in this case. If correctly interpreted, Petitioners first appear to be challenging the authority of the District Court to enter a stay Order in this case. They argue that federal courts have or should have exclusive subject matter jurisdiction over civil actions brought under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, and the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.* Under Petitioners' theory, the District Court should not have stayed the federal court action, and the Third Circuit should not have affirmed the stay Order. The second reason appears to be that the Third Circuit abused its discretion when it penalized Petitioners and their counsel for a frivolous appeal.

Your Respondent, which was denominated "St. Agnes" or "defendant" by the courts below, contends that neither of these proffered reasons constitutes adequate grounds for issuance of a Writ in this case. Therefore, the Petition for Writ of Certiorari should be denied.

I.

STATE COURTS HAVE CONCURRENT JURISDICTION OVER CIVIL ACTIONS BROUGHT UNDER THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT, 42 U.S.C. § 1395dd, AND UNDER THE FALSE CLAIMS ACT, 31 U.S.C. § 3729, *et seq.*

Petitioners are not suggesting that the Third Circuit's decision conflicts with a decision of another Circuit or of a state court of last resort or so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 10(a). Petitioners are also not suggesting that the Third Circuit has decided an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Rather, Petitioners claim that the Third Circuit "surrendered jurisdiction to the State Court of Pennsylvania." (*See* Pet. at 7). However, this claim is contrary to a long line of cases decided by this Court holding that, as a general rule, state courts have concurrent jurisdiction with federal courts over claims arising under federal laws unless Congress explicitly or implicitly confines jurisdiction to the federal courts.

Most recently, in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), this Court stated that "[u]nder our 'system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.' " *Id.* at 823, *quoting Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); and *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876). *See also, Houston v. Moore*, 5 Wheat. 1, 25-26 (1820). This

presumption is so well-established as to be axiomatic. *Tafflin*, 493 U.S. at 458. It is so deeply ingrained in our constitutional jurisprudence that it is the rule rather than the exception:

> We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962). *See also, Yellow Freight System, Inc.*, 494 U.S. at 826 ("the presumption of concurrent jurisdiction . . . lies at the core of our federal system.").

Thus, there is no question that state courts generally have concurrent subject-matter jurisdiction over a federal cause of action. *Gulf Offshore Co.*, 453 U.S. at 477-78. In *Yellow Freight System, Inc., supra*, this Court held that state courts have concurrent jurisdiction to adjudicate claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* In *Tafflin, supra*, this Court held that state courts have concurrent jurisdiction to adjudicate claims brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* In *Gulf Offshore Co., supra*, this Court held that state courts have concurrent jurisdiction to adjudicate claims brought under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* In *Charles Dowd Box Co., supra*, this Court held that state courts have concurrent jurisdiction to adjudicate a suit for violation of a contract between an employer and a labor organization brought under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

The axiomatic presumption in favor of concurrent state court jurisdiction is rebutted only if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim, either explicitly or implicitly. *Yellow Freight System, Inc.*, 494 U.S. at 823; *Tafflin*, 493 U.S. at 459; *Gulf Offshore Co.*, 453 U.S. at 478. Congress may confine subject matter jurisdiction to the federal courts by an explicit statutory directive, by unmistaken implication from legislative history, or by a clear incompatibility between the state court jurisdiction and federal interests. *Yellow Freight System, Inc.*, 494 U.S. at 823-26; *Tafflin*, 493 U.S. at 459-60; *Gulf Offshore Co.*, 453 U.S. at 478; *Charles Dowd Box Co.*, 368 U.S. at 507-08; *Claflin*, 93 U.S. at 136-37.

If Petitioners are asking this Court to legislate the subject matter jurisdiction of the federal courts ("Medicare . . . should be subject to the exclusive review of the federal courts." (*See* Pet. at 5). "The False Claims Act . . . should be under the exclusive jurisdiction of the federal courts." (*See* Pet. at 6)), that request is obviously directed at the wrong branch of government. Congress, not this Court, is constitutionally empowered to confine subject matter jurisdiction to the federal courts. *Tafflin*, 493 U.S. at 459. If Petitioners are asking this Court to rule that Congress has conferred exclusive jurisdiction on the federal courts for claims arising under the EMTALA and the FCA, Petitioners' argument is equally misplaced.

A. State Courts Have Concurrent Jurisdiction Over Claims Brought Under The Emergency Medical Treatment And Labor Act, 42 U.S.C. § 1395dd.

We begin with the text of EMTALA itself. The civil enforcement provision of this federal law is as follows:

(A) Personal harm. Any individual who

> suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

42 U.S.C. § 1395dd(d)(2)(A). There is no language here that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. As this Court stated in *Yellow Freight System, Inc.*, 494 U.S. at 823: "The omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent."

Turning to the legislative history, the House Committee on Ways and Means stated during its debate over the merits of H.R. 3128, the bill that eventually became the Act:

> Any persons or entity adversely and directly affected by a participating hospital's violation of these requirements may bring an action, *in an appropriate state or Federal district court*, for damages to the person arising from the violation . . .

H.R. Rep. No. 241(I), 99th Cong., 1st Sess. 28, *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 606 (emphasis added). This legislative history unmistakenly reveals that Congress intended that EMTALA claims be brought concurrently in either state or federal courts. Indeed, the language "damages available for personal injury under the law of the State in which the hospital is located" appears to evince a Congressional preference for state court jurisdiction over EMTALA claims.

Finally, Petitioners seem to be contending that state court jurisdiction over EMTALA claims would be incompatible with the federal interest in uniform interpretation of federal laws. (*See* Pet. at 6). However, this precise argument was raised by the Petitioners in *Tafflin*, and rejected as unpersuasive:

> [O]ur decision today creates no significant danger of inconsistent application of federal criminal law. . . . [F]ederal courts, pursuant to § 3231, would retain full authority and responsibility for the interpretation and application of federal criminal law, for they would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts. State courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law. State court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court. Thus, we think that the state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law, and will not, in any event, result in any more inconsistency than that which a multimembered, multitiered federal judicial system already creates.
>
> * * *

> To hold otherwise would not only denigrate the respect accorded coequal sovereigns, but would also ignore our "consistent history of hospitable acceptance of concurrent jurisdiction."

Id. at 464-465, *quoting Charles Dowd Box Co.*, 368 U.S. at 508 (internal citations omitted). Moreover, because the rules governing damages claims brought under EMTALA are borrowed from state laws that vary from state to state, there is no need for uniform interpretation of EMTALA. "State judges have greater expertise in applying these laws and certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law." *Gulf Offshore Co.*, 453 U.S. at 484.

Federal courts that have considered the question of federal court subject matter jurisdiction over EMTALA claims have held that state and federal courts have concurrent jurisdiction over such claims. *See e.g., Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131 (6th Cir. 1990); *Bryant v. Riddle Memorial Hosp.*, 689 F. Supp. 490 (E.D. Pa. 1988). *See also, HCA Health Services of Indiana, Inc. v. Gregory*, 596 N.E. 2d 974 (Ind. App. 1 Dist. 1992) (EMTALA claim governed exclusively by federal law but may be pursued in federal or state fora) (dictum)). The authorities cited by Petitioners do not suggest otherwise. (*See* Pet. at 6). None of these cases addressed the question of exclusive subject matter jurisdiction of federal courts. Although a discussion of uniformity of federal laws appears in *United States v. Kimbell Foods, Inc.*, 440 U.S. 730 (1979), and in *United States v. Pisani*, 646 F.2d 83 (3d Cir. 1981), the question presented in these cases was whether federal or state law provided the pertinent rule of law.

In conclusion, nothing in the language, in the legislative history, or by implication from EMTALA itself suggests that

Congress intended federal courts to have exclusive subject matter jurisdiction over EMTALA claims. Consequently, this Court should reject Petitioners' legally unsound suggestion that Congress has confined the subject matter jurisdiction of EMTALA claims to federal courts.

B. State Courts Have Concurrent Jurisdiction Over Claims Brought Under The False Claims Act, 31 U.S.C. § 3729, *et seq.*

Beginning once again with the textual language, jurisdiction over FCA claims is provided as follows:

> (a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred.

31 U.S.C. § 3732(a). This grant of federal jurisdiction is plainly permissive, not mandatory, for " '[t]he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be.' " *Tafflin*, 493 U.S. at 460-61, *quoting Charles Dowd Box Co.*, 368 U.S. at 506. " 'It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.' " *Tafflin*, 493 U.S. at 461, *quoting Gulf Offshore Co.*, 453 U.S. at 479 (*citing United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936)).

The legislative history of the FCA is equally unhelpful to Petitioners. In *U.S. Ex Rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624 (N.D. Ill. 1992), the District Court granted the

defendant's motion to dismiss or stay the federal court FCA proceedings based on the pendency of state court proceedings. One of the reasons for doing so was that "the legislative history reveals no evidence that Congress addressed or even considered the question of concurrent state court jurisdiction over FCA claims. Further, there is no suggestion that Congress, in its deliberations, affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts." *Id.* at 632, citing *Tafflin*. Absence of legislative deliberation on the question does not evince either explicit or implicit confinement of subject matter jurisdiction to federal courts.

Finally, for the reasons already discussed above, there is no overriding need for uniform interpretation of FCA laws. FCA claims involve allegations of fraud and misrepresentation, claims commonly based on the common law. State courts presumably have great expertise with these types of claims. *Gulf Offshore Co.*, 453 U.S. at 484; *Hartigan*, 797 F. Supp. at 632. Therefore, even if, the FCA was designed to protect the government and ultimately the taxpayers from fraud, as Petitioners suggest, state courts remain fully competent to effectuate this purpose.

Federal courts that have considered the question of state court jurisdiction over FCA claims have answered the question in the affirmative. *See e.g., Hartigan, supra* (FCA action stayed pending ongoing state court proceedings because state court had concurrent jurisdiction over FCA claims and factors enunciated in *Colorado River* justified stay); *United States Ex Rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370 (S.D. Tex. 1994) (dismissing FCA Complaint on basis of *res judicata* after determining, *inter alia*, that state court had jurisdiction over FCA claims). The cases cited by Petitioners do not indicate otherwise. (*See* Pet. at 7). The issue in those cases was whether the plaintiff could bring a cause of action under the

whistleblower provision of the FCA, not whether the federal court had exclusive jurisdiction over the claim.

In conclusion, nothing in the language, in the legislative history, or by implication from the FCA itself suggests that Congress intended federal courts to have exclusive subject matter jurisdiction over FCA claims. Consequently, this Court should reject Petitioners' legally unsound suggestion that Congress has confined the subject matter jurisdiction of FCA claims to federal courts.

II.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION WHEN IT PENALIZED PETITIONERS AND THEIR COUNSEL UNDER FEDERAL RULE OF APPELLATE PROCEDURE 38 FOR A FRIVOLOUS APPEAL.

Petitioners' final question presented, if understood correctly, also fails to implicate any of the considerations enumerated in Supreme Court Rule 10 justifying review on Certiorari. Rather, Petitioners merely quarrel with the Third Circuit's discretionary factual finding that the appeal of the District Court stay Order was frivolous and that Petitioners and their counsel should be penalized for causing St. Agnes financial damage by having to respond to such utter frivolity. This ground, which rarely supports review on Certiorari, *see* Sup. Ct. R. 10, does not present a compelling reason for review in this case.

Continuing on a course that has already resulted in serious financial repercussions to them, Petitioners blatantly and egregiously misrepresent the factual and legal bases for the Third Circuit's attorney fee award. They contend that they "must be protected from penalties designed to frustrate investigation"

because EMTALA and the FCA prohibit penalizing parties that "expose[] wrongful conduct." (*See* Pet. at 8, 10). In support, Petitioners cite the whistleblower provisions contained in EMTALA:

> (i) *A participating hospital* may not penalize or take adverse action against a *qualified medical person . . . or a physician* because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized *or against any hospital employee* because the employee reports a violation of a requirement of this section.

EMTALA, 42 U.S.C. § 1395dd(i) (emphasis added). Thus, under EMTALA, only "qualified medical persons, physicians, and hospital employees" are protected. Petitioners also cite the whistleblower provision contained in the FCA:

> *An employee who is discharged*, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer *because of lawful acts done by the employee on behalf of the employer or others in furtherance of an action under this section*, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. . . .

FCA, 31 U.S.C. § 3730(h) (emphasis added). Thus, the FCA protects only "employee[s] . . . [retaliated] against . . . by his or

her employer because of lawful acts done . . . in furtherance of an action under this section." *See e.g, Clemes v. Del Norte County Unified School District*, 843 F. Supp. 583, 595 (N.D. Cal. 1994) ("Section 3730(h) . . . provides relief for any employee who is retaliated against 'because of lawful acts done by the employee . . . in furtherance of an action under this section.' "); *Hardin v. DuPont Scandinavia (ARA-JET)*, 731 F. Supp. 1202, 1205 (S.D.N.Y. 1990) ("§ 3730(h) . . . allows an 'employee' to recover damages if her employer retaliates against her for taking steps 'in furtherance of an action' under § 3730."). The one case cited by Petitioners in support of their argument, (*see* Pet. at 9), is actually in accord with *Clemes* and *Hardin* because it was a civil action filed by an employee under 31 U.S.C. § 3730(h) claiming to have been retaliated against for reporting fraudulent practices to her employer.

In the present case, Petitioners do not fall into any of the categories of persons protected under the whistleblower provisions of EMTALA or the FCA. They are not qualified medical persons, physicians, hospital employees, or employees discharged because of lawful acts done on behalf of the employer in furtherance of an action under 31 U.S.C. § 3730(h). Therefore, because Petitioners do not qualify for whistleblower protection under EMTALA or the FCA, it is clear that they were not "punished because . . . they exposed wrongful conduct." (*See* Pet. at 10). Rather, they were punished because they filed an appeal to the Third Circuit that was patently and utterly frivolous, as is their Petition filed in this Court.

Petitioners also appear to contend that the Third Circuit's attorney fee award is erroneous because St. Agnes somehow failed to comply with Third Circuit L.A.R. 108.1, which requires a party applying for an award of attorneys' fees to include with the application "a short statement of the authority pursuant to which the party seeks the award . . . show[ing] the nature and

extent of services rendered and the amount sought, including an itemized statement in affidavit form . . . stating the actual time expended and the rate at which fees are computed, together with a statement of expenses for which reimbursement is sought." As is evidenced by the Third Circuit's Order granting the Application, Respondent complied with this rule in all respects. (*See* Resp. App. at 20a-21a). Although Petitioners filed objections to the Application before it was granted, they did not object that the Application failed to comport with the procedural elements of Third Circuit L.A.R. 108.1.

Petitioners also complain that the Third Circuit "refused to stay the mandate." (*See* Pet. at 10). Once again, this is a distortion of the truth. In actuality, Petitioners tried twice to stay the mandate and once to recall it. They filed their first Motion to Stay the Mandate after the Third Circuit issued a certified judgment in lieu of the mandate but before St. Agnes had even filed its Application for Attorneys' Fees and Double Costs. This Motion to Stay was denied because "no substantive right of the applicants [Petitioners] will be affected by failure to grant the stay of mandate." (Pet. App. 32). The Third Circuit's attorney fee award to St. Agnes prompted Petitioners to file a second Motion to Stay the Mandate. However, this Motion was rejected by the Third Circuit because the Federal Rules of Appellate procedure do not provide for a second motion to stay the mandate. Subsequently, Petitioners filed a Motion to Recall the Mandate, which is still pending. Thus, the Third Circuit did not refuse to stay the mandate after awarding attorney's fees to St. Agnes, as Petitioners suggest. Rather, the Third Circuit rejected Petitioner's duplicative motion to stay as violative of the Federal Rules of Appellate Procedure.

Petitioners' Motion for Rehearing En Banc on Assessment of Attorney's Fees Against the Estate of Bernice Menna was treated by the Third Circuit as a Motion for Reconsideration

under the Third Circuit's Internal Operating Procedures and referred only to the panel that granted the attorney fee award. *See* 3d Cir. I.O.P. 10.3.3.

Petitioners also contend that "th[e] appeal [to the Third Circuit] was not frivolous because when St. Agnes questioned the Court's jurisdiction it was the *panel* that allowed the appeal to proceed." (*See* Pet. at 10) (emphasis in original). This is yet another distorted version of the facts. On January 4, 1995, the Office of the Clerk of the United States Court of Appeals for the Third Circuit notified counsel for both parties of possible dismissal due to a jurisdictional defect and directed them to respond in writing by January 17, 1995. The defect cited was the lack of a final order within the meaning of 28 U.S.C. § 1291. In response, St. Agnes timely filed a brief in which it conceded that the District Court's stay Order is appealable under 28 U.S.C. § 1291. Petitioners, on the other hand, filed only a copy of the Court of Common Pleas Order denying Petitioners' Motion for Reconsideration and a copy of some brief filed in the state court action. The Third Circuit rejected this submission as non-responsive to the January 17, 1995, request, and made a second request of Petitioners to respond to the jurisdictional question. Petitioners finally submitted a letter to the Third Circuit representing, *inter alia*, that the Third Circuit had jurisdiction because the District Court's stay Order was made final by entry of the Court of Common Pleas Order denying Petitioners' Motion for Reconsideration. Thus, it is simply not true that St. Agnes questioned the Third Circuit's jurisdiction over the appeal. Rather, the Third Circuit raised a possible jurisdictional defect *sua sponte*, after which St. Agnes conceded the Third Circuit's subject matter jurisdiction over the appeal. The fact that the Third Circuit panel ultimately found that it had subject matter jurisdiction over the appeal and reached the substance of the question presented does not signify that the question was worth considering.

In fact, Petitioner's appeal to the Third Circuit was devoid of merit. However, rather than rehashing the countless reasons why the appeal from the District Court stay Order was frivolous, Respondent attaches to this Brief the Application for Attorney's Fees and Double Costs that was granted by the Third Circuit and a copy of the Affidavit of its counsel filed in support of the Application. (*See* Resp. App. at 3a-21a). As Respondent explained at length in the Application, the Brief filed by Petitioners in the Third Circuit was essentially non-responsive to the District Court's legal analysis. It was illogical, factually baseless, and replete with mischaracterizations and distortions. Petitioners misrepresented to the Third Circuit the Statement of Issues, the Statement of Jurisdiction, and the Statement of the Scope of Review. Their Brief addressed for the most part dissimilar issues that were under review by the Superior Court of Pennsylvania rather than the issues that were under review by the Third Circuit. They raised arguments contrary to decisions of this Court and of lower federal courts and did not even attempt to distinguish these authorities factually or legally. Finally, and most egregiously, their Brief was replete with the same blatantly false accusations of fraud and destruction and concealment of Bernice Menna's 1984 medical records that are laced throughout the Petition for Writ of Certiorari. Because Petitioners' appeal to the Third Circuit exceeded all permissible bounds of zealous advocacy, Petitioners and their counsel were properly sanctioned by the Third Circuit.

Finally, to the extent that Petitioners challenge the correctness of the District Court's stay Order and the Third Circuit's affirmance of that Order, their challenge must be rejected as legally and factually unsound. Application of the *Colorado River* exceptional circumstances doctrine was correct in this case given the pendency of parallel and concurrent state court proceedings, the final disposition of which the federal court will be bound to honor as *res judicata*. The Factual History

set out at the beginning of this Brief confirms this conclusion. (*See also,* Pet. App. at 4-6, 17-18, 22, 25). Moreover, nearly all of the factors set out by this Court in *Colorado River* are satisfied in this case. (*See* Pet. App. at 6-8, 23-25). To the extent that Petitioners appear to contend that *Colorado River* has been or should be limited to its facts, this argument is belied by the countless decisions issued by federal courts turning on the *Colorado River* exceptional circumstances doctrine. (*See* Pet. App. at 25).

For all of the above reasons, Petitioners have presented no compelling reason to undertake a review of the Third Circuit's discretionary decision to penalize Petitioners and their counsel for a frivolous appeal. Consequently, this Court should reject as factually and legally unsound Petitioner's contention that the attorney fee award granted to St. Agnes by the Third Circuit was in any way inappropriate.

CONCLUSION

Petitioners have set forth no compelling reasons why this Court should grant their Petition. Petitioners do not even attempt to bring their case within the parameters of the considerations set out by this Court in Supreme Court Rule 10 justifying review. Rather, they present questions that were settled by this Court long ago and quarrel with discretionary factual findings of the Third Circuit. Accordingly, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT PENNSYLVANIA FILED SEPTEMBER 14, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-2424

THE ESTATE OF MENNA, et al.

v.

ST. AGNES MEDICAL CENTER

ORDER

VanARTSDALEN, S.J.

Upon consideration of the motion of plaintiff to compel the deposition of Donald F. Ladd, Esq., and the response of defendant to the motion, the motion is DENIED for failure of plaintiff to provide the required self-executing discovery disclosures prior to seeking discovery, as required by Sections 4.01 (a) and (b) of the Civil Justice Expense and Delay Reduction Plan of the United States District Court for the Eastern District of Pennsylvania. To the extent the motion may be deemed a motion for leave of court to take the deposition of Donald F. Ladd, Esq. prior to providing defendant with the self-executing discovery disclosures set forth in Section 4.01 (a) of the said Civil Justice Expense and Delay Reduction Plan, the same is DENIED.

Appendix A

BY THE COURT:

s/ Donald W. VanArtsdalen
Donald W. VanArtsdalen, S.J.

September 12, 1994

APPENDIX B — ST. AGNES APPLICATION FOR ATTORNEY'S FEES DATED OCTOBER 26, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-2040

THE ESTATE OF BERNICE MENNA; DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA

APPELLANTS

v.

ST. AGNES MEDICAL CENTER

APPELLEE

APPELLEE ST. AGNES MEDICAL CENTER'S APPLICATION FOR ATTORNEY'S FEES AND DOUBLE COSTS INCURRED IN CONNECTION WITH THE FRIVOLOUS APPEAL OF APPELLANTS THE ESTATE OF BERNICE MENNA AND DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA

Appellee St. Agnes Medical Center, through its attorneys, White and Williams, applies to this Court for an award of reasonable attorney's fees and double costs, under the authority of Federal Rule of Appellate Procedure 38 and Third Circuit LAR Misc 108.1, on the grounds that Appellants The Estate of Bernice Menna and Daniel Menna, Individually and As Administrator of the Estate of Bernice Menna have filed a

frivolous appeal from an Order of the Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, staying appellants' federal court action under the "exceptional circumstances" doctrine of *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Because appellants' Brief to this Court was predominantly illogical and irrelevant and rested in large part on serious misstatements and distortions of the state and federal court records and because appellants' legal arguments on appeal were wholly without merit and lacked colorable support, St. Agnes respectly submits that it is entitled to reimbursement of its attorney's fees and to an award of double costs incurred in connection with this appeal. St. Agnes submits the attached Memorandum of Law in support of this Application.

Respectfully submitted,

WHITE AND WILLIAMS

BY: Bryan D. McElvaine
Robert Toland II
Amy R. Snell
1800 One Liberty Place
Philadelphia, PA 19103-7395
Attorneys for Appellee
St. Agnes Medical Center

Dated: October 26, 1995

APPENDIX C — MEMORANDUM OF LAW IN SUPPORT OF APPLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-2040

THE ESTATE OF BERNICE MENNA; DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA

APPELLANTS

v.

ST. AGNES MEDICAL CENTER

APPELLEE

MEMORANDUM OF LAW IN SUPPORT OF APPELLEE ST. AGNES MEDICAL CENTER'S APPLICATION FOR ATTORNEY'S FEES AND DOUBLE COSTS INCURRED IN CONNECTION WITH THE FRIVOLOUS APPEAL OF APPELLANTS THE ESTATE OF BERNICE MENNA AND DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA

I. INTRODUCTION

Appellee St. Agnes Medical Center ("St. Agnes") respectfully requests this Court to sanction Appellants The Estate of Bernice Menna and Daniel Menna, Individually and As

Appendix C

Administrator of the Estate of Bernice Menna, ("appellants"), under the authority of Rule 38 of the Federal Rules of Appellate Procedure and Third Circuit LAR Misc 108.1, for filing a frivolous appeal from an Order of the Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, staying appellants' federal court action under the "exceptional circumstances" doctrine of *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Because appellants' Brief to this Court was predominantly illogical and irrelevant and rested in large part on serious misstatements and distortions of the state and federal court records and because appellants' legal arguments on appeal were wholly without merit and lacked colorable support, St. Agnes respectly submits that it is entitled to reimbursement of its attorney's fees and to an award of double costs incurred in connection with this appeal.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

Bernice Menna received medical treatment at St. Agnes in 1984. In 1985, she filed a medical malpractice action in the Philadelphia Court of Common Pleas against St. Agnes and her treating physician at St. Agnes, Bernard Segal, M.D. In 1987, plaintiff's then-attorney, Gustine J. Pelagatti, stipulated to dismiss St. Agnes from the lawsuit with prejudice because there was no evidence that St. Agnes had breached any duty of care with respect to Mrs. Menna.

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1. Rather than rehashing the very complex and extensive procedural history of this case, St. Agnes has attached to this Memorandum of Law as Exhibit A a copy of the Brief of Appellee St. Agnes Medical Center submitted to this Court in response to appellants' Brief on appeal. An abbreviated version of that history is repeated here for this Court's convenience in resolving St. Agnes' Application.

Appendix C

Nearly three years later, appellants embarked on a still-ongoing journey through the state and federal court systems seeking to resurrect their medical malpractice claims against St. Agnes. This journey began in state court in 1990 when appellants and their substituted-counsel, John J. O'Brien, III,[2] moved unsuccessfully to strike off the discontinuance. Since 1990, appellants have filed two additional state court complaints which were later dismissed,[3] a second unsuccessful motion to strike off the discontinuance,[4] three unsuccessful appeals to the Pennsylvania Superior Court,[5] and to date one unsuccessful appeal to the Pennsylvania Supreme Court.[6] The journey

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2. Mr. O'Brien is married to Mrs. Menna's daughter, Josephine Menna O'Brien.

3. In 1990, appellants attempted unsuccessfully to amend their discontinued complaint against St. Agnes. In 1993, after settling their dispute with Dr. Segal, appellants filed a legal malpractice action against Mr. Pelagatti, which was dismissed in 1994 after the lower court granted summary judgment in favor of Mr. Pelagatti and against the appellants.

4. In 1993, appellants moved for reconsideration of the lower court's refusal in 1990 to strike off the discontinuance. In 1994, appellants filed three "supplementals" to the 1993 motion. The lower court denied the Motion for Reconsideration in 1994.

5. In 1991, the Superior Court affirmed the lower court's denial of appellants' motions to strike off the discontinuance and to amend their complaint. In 1995, the Superior Court affirmed the lower court's 1994 Order denying reconsideration of the 1990 Order refusing to strike off the discontinuance. In 1995, the Superior Court also affirmed the lower court order dismissing the legal malpractice action against Mr. Pelagatti.

6. The Pennsylvania Supreme Court affirmed the 1991 Superior Court Order affirming the lower court rulings. Appellants have also filed with the

(Cont'd)

continued down a new road when appellants filed an action in federal court against St. Agnes on April 19, 1994 (while their motion in the lower court for reconsideration of the earlier order refusing to strike off the discontinuance was still pending).

The factual basis of all of the above pleadings was identical: that St. Agnes failed and neglected to properly treat Mrs. Menna, that St. Agnes allegedly violated Medicare regulations when Utilization Review required that Mrs. Menna be discharged even though she had suffered a stroke, and that St. Agnes and its counsel "concealed, destroyed and falsified medical records in violation of the Medicare Health Act." *See* Appellants' Br. at 1, attached as Exhibit B.

On September 2, 1994, St. Agnes moved to dismiss the federal court action on the basis of *res judicata*, lack of federal court jurisdiction to collaterally attack a state court judgment, and failure to state a claim upon which relief could be granted. On September 23, 1994, Judge VanArtsdalen entered a Memorandum Opinion and Order staying the federal court proceedings pending the outcome of the parallel and concurrent state court proceedings. *See* Memorandum Opinion and Order attached to Exhibit B. In substance, Judge VanArtsdalen determined that the "exceptional circumstances" doctrine set forth by the United States Supreme Court in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 s.Ct. 1236, 47 L.Ed.2d 483 (1976), applies because the ongoing state court proceedings may result in a judgment in favor of St. Agnes that the federal court would be bound to honor as *res judicata*.

(Cont'd)
Pennsylvania Supreme Court a Petition for Allowance of Appeal from the Superior Court's 1995 Order affirming the lower court's refusal to reconsider its earlier decision not to strike off the 1990 discontinuance.

Appendix C

Despite the stay Order, appellants moved on September 29, 1994 to amend their federal court action to add claims of "intentional trespass." In response, Judge VanArtsdalen entered an Order on October 5, 1994 denying appellants' motion and stating that "[n]o further pleadings are to be filed by the parties as long as the stay of proceedings is in effect, without first obtaining leave of court for good reason shown."

On October 18, 1994, appellants appealed the two federal court Orders.[7] On September 5, 1995, after unanimously deciding under Third Circuit LAR 34.1(a) that oral argument was not needed in this case, this Court issued its Memorandum Opinion affirming the District Court stay Order. A copy is attached as Exhibit C.

Continuing on with their journey, appellants on September 15, 1995, filed a Petition for Rehearing En Banc, which was denied on October 12, 1995 without the Court's requesting a response from St. Agnes. On October 23, 1995, appellants filed with this Court a Motion for Stay of mandate so that they can file a Petition for Writ of Certiorari to the United States Supreme Court seeking review of the following issues:

> "1. The holdings of this Court, in the instant case surrenders jurisdiction over the Medicare Act to the State Court. 42 U.S.C.A. §1395 et seq.

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7. However, appellants waived their appeal from October 5, 1994 Order by failing to address it in their Brief to this Court. *See* Ex. A at 2 n.1. This Court in its Memorandum Opinion affirming the District Court stay order basically agreed: "Because we will affirm the entry of the stay, we need not reach the appeal of the denial of leave to amend the complaint, which plaintiff does not raise in any event." *See* Ex. C at 8.

> 2. The decision of this court confers on the State Courts the jurisdiction to enforce the False Claims Act 31 U.S.C.A. §3729 et seq."

In accordance with Third Circuit LAR 108.1, this Application has been filed within 14 days after the disposition of appellants' Petition for Rehearing En Banc.

III. LEGAL ARGUMENT

Federal Rule of Appellate Procedure 38 provides that this Court may award just damages, including reasonable attorney's fees, and single or double costs, if it determines that an appeal is frivolous:

> If a court of appeals shall determine that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Interpreting Rule 38, this Court will sanction an appellant for filing an appeal that is "wholly without merit." *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993) (awarding attorney's fees and costs under Rule 38); *Quiroga v. Hasbro, Inc.*, 943 F.2d 346, 347 (3d Cir. 1991) (same); *Hilmon Co. (V.I.), Inc. v. Hyatt Intern.*, 899 F.2d 250, 251 (3d Cir. 1990 (same). The inquiry is an objective one, focusing on the merits of the appeal.

In *Nagle, supra*, the appellant appealed from an order granting summary judgment against him on four independent grounds. Because he had appealed only two of the four grounds,

he had no chance of succeeding on appeal. Under those facts, this Court held that sanctions were justified under Rule 38 because "the appeal appeared to have been doomed to failure from the moment the plaintiff-appellant's brief was filed in this court and, hence, was frivolous." *Id.*, 8 F.3d at 144. Because there was no possibility that plaintiff's appeal would succeed, this Court concluded that it would be unfair to allow the appellees who have been damaged financially by a frivolous appeal to go uncompensated. *Id.*, 8 F.3d at 145.

In concluding in *Nagle* that the appeal never had any possibility of resulting in a reversal, this Court cited with approval *Romala Corp. v. United States*, 927 F.2d 1219 (Fed.Cir. 1991), a case in which the Federal Circuit Court of Appeals likewise determined that sanctions against the appellant were appropriate under Rule 38. In *Romala Corp.*, a government contractor appealed from a District Court determination upholding the government's termination of a contract. After the order was affirmed, the appellant was sanctioned because his brief consisted of irrelevant and illogical arguments based on factual misrepresentations and false premises:

> In sum, Romala consistently avoids *addressing* what is clearly the actual basis of the Claims Court's judgment, much less pointing to anything in that judgment that is arguably wrong or offering a cogent argument for reversal. Most seriously of all, some of Romala's arguments are based on misrepresentations and distortions of its opponent's arguments and the Claims Court's opinion.

> But the appellate tactics for which we here sanction Romala, consisting almost entirely of irrelevant and misleading arguments as well as outright misrepresentations, exceed all permissible bounds of zealous advocacy and have been repeated condemned.

Id., 927 F.2d at 1224. *See also Tomczyk v. Blue Cross & Blue Shield*, 951 F.2d 771 (7th Cir. 1991) (imposing Rule 38 sanctions because appeal was frivolous and was presented in misleading manner); *Thomas v. Digital Equipment Corp.*, 880 F.2d 1486 (1st Cir. 1989) (imposing Rule 38 sanctions in part because of blatant mischaracterizations in appellants' brief). These authorities persuasively instruct that sanctions against appellants and their counsel are warranted in this case.

Appellants' Brief to this Court was basically non-responsive to Judge VanArtsdalen's legal analysis and was largely illogical, factually baseless, and replete with mischaracterizations and distortions. For example, appellants' Statement of Issue was as follows:

> May a party file a separate action under the False Claims Act (31 U.S.C.A. §3729 et seq) when it has been determined that a hospital has concealed, destroyed and falsified medical records in violation of the Medicare Health Act (42 U.S.C.A. §1395); indeed is such consummate fraud actionable upon discovery?

See Ex. B at 2. In reality, the only issue before this Court was whether the District Court had properly concluded that a stay of

federal court proceedings was appropriate under the *Colorado River* "exceptional circumstances doctrine" given the pendency of state court proceedings, the outcome of which the federal court might be bound to honor as *res judicata*. *See* Ex. A at 4. This Court agreed, as it indicated at the very beginning of its Memorandum Opinion: "A brief recitation of the state court proceedings makes manifest the wisdom of the district court's decision." *Ex. C at 2.*

In addition, the appellants included the following as their Statement of Jurisdiction:

> This Honorable Court has jurisdiction over the within matter because the Hospital Appellee concealed, destroyed and falsified medical records in violation of the Medicare Health Act (42 U.S.C.A. § 1395 et seq). Such misconduct would make the hospital subject to the False Claims Act (31 U.S.C.A. § 3729 et seq). Because the hospital's conduct is a violation of Federal Statutes, the U.S. District Court has jurisdiction over this matter.
>
> The hospital also violated the intent of the Medicare Health Act "to insure that adequate medical care is available to the aged throughout this country." *Hultzman vs. Weinberger,* 495 F.2d 1276 (3rd Cir. 1974).
>
> The hospital also violated Federal regulations found in the Federal Register Vol. 49 No. 1, Tues. January 3, 1984 § 405.472

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Conditions for payment under the prospective payments system.

For the above stated reasons the Appellant believes that the U.S. District and this Court have the exclusive jurisdiction to hear this matter.

See Ex. B at 1. In reality, the District Court's subject matter jurisdiction was premised on diversity of citizenship and on the fact that appellants' claim involved a federal question. *See* Ex. A. at 1-2.[8] This Court's jurisdiction was premised on the entry of a final district court Order appealable of right. *See* Ex. A at 2. As their Statement of Scope of Review, appellants stated:

> The Court's scope of Review is plenary because the Appellee's alleged conduct involves the concealment, destruction and falsification of Medicare records which is a violation of the Medicare Health Act (42 U.S.C.A. § 1395 et seq.), the False Claims Act (31 U.S.C.A. §3729 et seq.) and Federal Regulations (Fed. Reg. Vol. 49 No. 1 Jan. 3, 1984 §405.472).

See Ex. B at 4. In reality, under *Trent v. Dial Medical of Florida,*

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8. More accurately, the District Court had subject matter jurisdiction over only one of two of appellant's federal court claims. As St. Agnes pointed out to this Court in its Brief, because plaintiff's False Claims Act claim would naturally have arisen before 1986, the District Court did not have jurisdiction over that claim. *See, e.g., U.S. Ex Rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624, 627-30 (N.D.Ill. 1992) (dismissing False Claims Act complaint for claims completed prior to 1986 for lack of subject matter jurisdiction).

Inc., 33 F.3d 217, 223 (3d Cir. 1994), "the underlying legal questions are subject to plenary review, although the decision to abstain is reviewed for abuse of discretion." As this comparison reveals, the Statements of Issues on Appeal, Jurisdiction, and scope of Review contained in appellants' brief were not only illogical but blatantly misrepresented to this Court the nature of the proceedings on appeal. Therefore, sanctions are warranted under the persuasive authority of *Romala, Tomczyk,* and *Thomas.*

Moreover, 32 1/2 pages of appellants' 37-page Brief to this Court bore little, if any, relationship to the issue on appeal. In fact, comparison of the Brief filed by appellants in the Pennsylvania Superior Court in 1995 with respect to their appeal from their second unsuccessful attempt to strike off the discontinuance against St. Agnes (App. 1049-1081) with their Brief filed in this Court reveals that the two Briefs are nearly identical. However, the issue in the state appellate court was whether the lower court had properly refused to reconsider its earlier decision to strike off the discontinuance against St. Agnes. Conversely, the issue in this Court was whether the lower court properly stayed federal court proceedings pending the outcome of state court proceedings. Therefore, the first 32 pages and page 36 of appellants' Brief to this Court were irrelevant. Again, under the persuasive authority of *Romala, Tomczyk,* and *Thomas*, Rule 38 sanctions are warranted.

Finally, the 4 1/2 pages of argument that appellants purportedly directed to their appellate claims merits sanctions under *Nagle, Quiroga,* and *Hilmon* because these arguments were "doomed to failure from the moment the plaintiff-appellant's brief was filed in this court." *Nagle*, 8 F.3d at 144. If St. Agnes understands correctly appellants' legal argument to

this Court, they say that the stay Order was improper because jurisdiction over the Medicare Act and False Act claims is exclusively federal and that, therefore, a state court cannot have jurisdiction over these claims. According to appellants' tortured logic, if the state court cannot have jurisdiction over these claims, then the claims could not have been brought in state court. Therefore, a federal court would not be bound to honor any state court judgment as *res judicata*.

As St. Agnes discussed extensively in its Brief to this Court, *see* Ex. A at 24-31, appellants' claim is seriously and fundamentally flawed and absolutely lacking in any colorable merit. Not only is there **no** authority to support appellants' legal premise, but there is authority **to the contrary**, e.g, that state and federal courts have concurrent jurisdiction over claims brought under the Medicare Act and the False Claims Act. *E.g., U.S. Ex Rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624, 631-33 (N.D.Ill. 1992); *U.S. Ex Rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F.Supp. 370, 375 (S.D.Tex. 1994); *Bryant v. Riddle Mem. Hosp.*, 689 F.Supp. 490 (E.D.Pa. 1988); *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131 (6th Cir. 1990). This Court in its Memorandum Opinion affirming the stay Order "found nothing in the record [to] persuade us that the additional claims could not have been raised previously." Appellants' failure to even attempt to distinguish the above persuasive and well-reasoned authorities or to point to some evidence in the record that would support their appellate position merits imposition of sanctions. *Tomczyk*.

Moreover, appellants also failed to brief their appeal from the District Courts October 5, 1995, Order refusing to allow appellants to amend their Complaint. Therefore, appellants failed to preserve this issue for appeal, which also subjects them to sanctions under *Nagile*.

Appendix C

Perhaps the most significant reason for sanctioning appellants and their counsel in this case, however, is the blatant attack that they continue to advance against St. Agnes and its counsel. In pleading after pleading filed in state court, in the District Court, and again in this Court, appellants have accused St. Agnes and its counsel of fraudulently destroying, concealing, and falsifying medical records even though appellants have not one shred of evidence proving that most serious and damaging accusation. Court after court has rejected appellants' fraud claims as unfounded, yet appellants still persist with their attack against St. Agnes and its counsel. This senseless and vindictive behavior does a disservice both to this Court and to the litigants appearing before this Court whose cases are worthy of consideration. This point was observed cogently by the Seventh Circuit in *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1203 (7th Cir. 1985):

> the frequency with which federal judges are imposing sanctions for abuse of federal court process has increased markedly in recent years. The reasons are systemic. As the federal courts become more and more overloaded, the costs imposed on ethical and responsible litigants when judicial resources are diverted to the processing of frivolous claims and defenses mount higher and higher. Moreover, as the bar and the judiciary both expand, the incentive for self-regulation by lawyers that comes from appearing regularly before the same judges diminishes, making judicial regulation by sanctions increasingly necessary. We are in a transitional period, and some members of the

> bar still do not realize that the judicial attitude toward attorney misconduct has stiffened. They had better realize it.

Cited by this Court with approval in *Quiroga*, 943 F.2d at 347-48.

In the final analysis, a litigant's right to pursue an appeal must fall when the appeal lacks any colorable support, is wholly without merit, and exceeds all permissible bounds of zealous advocacy. In such a case, appellants and their counsel should both be sanctioned because St. Agnes has been "damaged financially by a frivolous appeal." *Nagle*, 8 F.3d at 145.

IV. CONCLUSION

For all of the above reasons, Appellee St. Agnes Medical Center moves the Court for an Order awarding it reasonable attorney's fees in the amount of $8,055.00 and costs in the amount of $334.80[9] incurred in connection with appellants' frivolous appeal. In accordance with Third Circuit LAR 108.1(c), attached is an Affidavit from counsel for St. Agnes' showing the nature and extent of the services rendered, the amount sought, the actual time expended, and the rate at which fees are computed.

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9. On October 20, 1995, this Court taxed costs against appellants in the amount of $334.80 pursuant to a Bill of Costs filed by St. Agnes. Therefore, St. Agnes is only requesting an additional amount of $334.80 as a sanction under Rule 38 and Third Circuit LAR 108.1.

Appendix C

Respectfully submitted,

WHITE AND WILLIAMS

BY: _____

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APPENDIX D — AFFIDAVIT IN SUPPORT OF APPLICATION DATED OCTOBER 26, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-2040

THE ESTATE OF BERNICE MENNA; DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA

APPELLANTS

v.

ST. AGNES MEDICAL CENTER

APPELLEE

AFFIDAVIT OF AMY R. SNELL, ESQUIRE

I, Amy R. Snell, Esquire, pursuant to sections 1924 and 1746 of the Judicial Code, 28 U.S.C. §§ 1924 and 1746, and Third Circuit LAR Misc. 108.1(c), verify and state that:

1. I am an attorney associated with the law firm of White and Williams, 1800 One Liberty Place, Philadelphia, PA 19103-7395.

2. I graduated from Wayne State University School of Law in 1983; served a two-year federal court clerkship with the Honorable Marcia G. Cooke, Magistrate Judge, United States District Court for the Eastern District of Michigan; and have at all times since 1985 been engaged in the practice of law.

Appendix D

3. Since 1988, I have specialized in the area of civil appellate litigation, both in state and federal courts.

4. I have been associated with the firm of White and Williams since February 1, 1995. Prior to that I practiced as an Assistant City Attorney with the City of Atlanta for 2 1/2 years and as an associate with Bendure & Thomas in Detroit, Michigan.

5. Between March 2, 1995 and June 2, 1995, White and Williams billed a total of approximately $8,055.00 for professional services rendered in connection with reviewing appellants' Brief to this Court, performing necessary legal research, and preparing Appellees' Brief to this Court.

6. These fees were calculated at a rate of $90/hour for 89.5 hours of professional services.

7. These fees were necessarily incurred in connection with this appeal.

8. The services for which these fees have been charged were actually and necessarily performed in connection with this appeal.

_____

Amy R. Snell

Dated: October 26, 1995